IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 164

MORRY LEVINE,

Petitioner,

against

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully petitions for the rehearing of this Court's decision affirming his conviction for criminal contempt.

Rehearing should be granted for the following reasons:

I

The Court's opinion is grounded upon a misconstruction of the Record. The Court in its opinion (Slip Op., 8) held that "the act of contempt" was petitioner's "definitive refusal to comply with the court's direction to answer

the previously propounded questions", in that petitioner told the court that he would not, if sent back to the grand jury room, answer the questions (R. 42).

The Certificate of the District Judge (R. 3-5), however, shows very clearly and definitely that the contempt for which petitioner was convicted was his refusal in the sealed off courtroom in the presence of the District Judge to answer each of the questions enumerated (R. 4, 5), as each was put to him by the District Judge and directed to be answered.

The Certificate (R. 3-5) of the District Judge does not specify as an act of contempt petitioner's statement to the court that he would not answer the questions, if he were returned again to the grand jury room (R. 42)—the statement or act now characterized by this Court as the contempt. [Besides this response by petitioner could not be a contempt, since there was not then a direct order to him to return to the grand jury room and answer the questions.]

The adoption by this Court, as the act of contempt here, of petitioner's statement that he would refuse to answer, if sent back to the grand jury room, does serve the purpose of avoiding consideration of the most serious problem created by this Court's theory as to the time for petitioner's counsel to have objected to the secrecy.

If, as this Court holds, objection to the secrecy should have been made at or just prior to the time that the contumacious act was to be committed, then on the Record of this case the objection required by this Court had to be made at the time that petitioner was summoned to the stand in the courtroom by the District Judge (R. 38, 39).

On this Court's theory (Slip Op., 8) that, aside from petitioner's counsel, petitioner had no right to have the

general public present while the grand jury questions were being read to him by the District Judge, petitioner's right to a public hearing or trial has been completely eliminated in this case, because, even if he made the objection then (the time of the contempt for which he was convicted), there would be no obligation on the part of the District Judge to open the courtroom, since this Court holds the grand jury secrecy to be supervening.

Thus, while apparently holding that petitioner did have some non-illusory right to a public hearing, this Court has in effect pointed out the way for the complete elimination of any meaningful public hearing for recalcitrant grand jury witnesses facing a conviction for contempt.

II

Even if this Court should not correct the misconstruction of the Record and say, as it should, that petitioner's right to have the general public present is supervening to that of the secrecy of the grand jury and, accordingly, that at the time petitioner was called to the stand, the District Judge should have opened the courtroom doors, then the issue would remain within the frame work of this Court's theory whether such proper objection had been taken as disclosed by this Record.

It is respectfully submitted that such is the case. All members of this Court appear to agree that a Rule 42(b) proceeding means an open public session or trial; consequently it would seem to follow that, where a request is made, as here, for a Rule 42(b) proceeding instead of the so-called Rule 42(a) proceeding then being pursued, objection has been made to secrecy and a request made for a public hearing.

And so, when petitioner was summoned to the stand in the courtroom over the objection of his counsel (R. 38), exception was taken and objection was made to the procedure and request was made that the court "proceed in accordance with Rule 42(b)" (R. 39).

Can there be any doubt that at that point the imperative was upon the District Judge, who only a few minutes before that had closed the doors of the courtroom, to reopen the same to the public?

III

It is not amiss to point out that a consequential effect of this Court's holding here is the elimination of the right to a *"locus penitentiae"* only recently accorded to recalcitrant grand jury witnesses by this Court in *Brown* v. *United States*, 359 U. S. 41.

Under this Court's holding that the act of contempt here was the petitioner's statement that he would refuse to answer the questions, if sent back to the grand jury room, and not his refusal to answer each question when put to him by the District Judge, all that is now needed for an adjudicable contempt under Rule 42(a), when a recalcitrant grand jury witness is brought before the District Court for the second time, as here, is for the District Judge, after hearing the grand jury stenographer's transcription of her notes, to ask the witness whether he would answer, if sent back to the grand jury room, and for the witness to state that he would not. The dilution of the rights of witnesses, even the bare bone minimum under the *Brown* case, is now complete.

This court has, therefore, increased the possibility of grand jury witnesses subpoenaed summarily for forthwith

appearances being incarcerated for the long sentences now justified under the *Brown* case without word to or knowledge of kin or counsel—leaving aside the public.

IV

This Court in its opinion made no allusion to petitioner's argument that the summary adjudication and punishment of petitioner was not Due Process, because the contumacious act was not committed in "open court". *Cook* v. *United States,* 267 U. S. 517, 536, 537; *Re Oliver,* 33 U. S. 257, 273-278. Unless the contempt is committed in open court, Due Process absolutely precludes any dispensation with notice, charges and hearing.

It may be, perhaps, that no reference was made directly to this point, because it may have been believed that this question was resolved in *Brown* v. *United States, supra;* on the theory, mistakenly, that this was a "common issue" controlled by that case.

This Court in the *Brown* case, however, pretermitted the issue of secrecy and must, therefore, be deemed to have treated the contempt as one which occurred in open court. If it had considered it as one which occurred in secrecy, then it could and would at that time have considered the issue here raised. Thus, this aspect of the Due Process question in this case was not determined or decided by this Court in the *Brown* case.

The issue was arguable by the petitioner on the present writ of certiorari because it was clearly within Question No. "1" allowed by this Court on its grant of the writ (R. 48).

The issue whether objection, proper or improper, was taken, was and is immaterial on this point. The District Court could only have jurisdiction summarily to convict

petitioner of contempt without notice and hearing, if the act of contempt were committed in open court; if not committed in open court Due Process, in that ultimate sense which does not permit it to be admeasured by the characteristics or facts of a particular case, denies jurisdiction to the District Court to exercise its summary power under Rule 42(a).

CONCLUSION

The misconstruction of the Record, the dilution of *Brown* v. *United States*, the existence of proper objection, the plain absence of jurisdiction in the District Court summarily to adjudicate the petitioner in contempt, and all the other reasons herein require the grant of rehearing.

Respectfully submitted,

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Myron L. Shapiro
Counsel for Petitioner

Certificate

It is hereby certified that the foregoing petition for rehearing is presented in good faith and not for delay.

MYRON L. SHAPIRO

Myron L. Shapiro
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